# No. 91-429

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

In re GEORGE R. WESTFALL,

*Petitioner.*

On Petition For a Writ of Certiorari to the
Supreme Court of the State of Missouri

## REPLY BRIEF FOR PETITIONER

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Respondent's opposition hardly addresses, let alone refutes, the main points demonstrated in the petition for certiorari: that this case presents an important, unresolved and frequently recurring First Amendment issue, on which state supreme court decisions conflict; and the lack of definitive guidance from this Court poses serious difficulties for lawyers having multi-state aspects to their practices. Respondent mainly attempts to obfuscate the facts and issues of this case and what the Missouri Supreme Court did below. We respectfully submit this reply to address the essential premises of respondent's opposition, all of which are demonstrably false.

1. Respondent contends that the petition raises no genuine constitutional issue because it assumes that the sole basis of Westfall's discipline was his criticism of an appellate court opinion when, in fact, he was disciplined for criticizing a judge. Opp. 6. Contrary to respondent's assertions, however, the petition contains no such misstatement of the facts or issue.

While we believe that the majority below erred in concluding that Westfall's critical remarks extended beyond the appellate court's opinion to implicate the integrity of the authoring judge, the principal constitutional issue raised by the petition in no way depends upon that distinction. Westfall's challenge to the Missouri Supreme Court's refusal to follow *New York Times* is expressly and unambiguously predicated on the majority's premise that his comments may be viewed as relating to the judge personally. Thus, the introductory paragraph to the questions presented states that "the supreme court viewed [Westfall's remarks] as reflecting adversely on the authoring judge." Pet. i. Similarly, the first question presented reads:

> Whether the First Amendment bars a State from disciplining a lawyer *for publicly criticizing a judge*, where the lawyer's criticism does not contain false statements of fact made with "actual malice" within the meaning of *New York Times Co. v. Sullivan*, and the criticism could not have prejudiced any adjudicative proceeding." (emphasis added).

Indeed, the *New York Times* test, by definition, applies only to statements which are potentially defamatory of some *person* or *entity*. The test has no application to remarks which merely criticize an opinion, writing or idea. The constitutional question posited above arises because, and only because, Westfall's petition assumes *arguendo* that his remarks may be viewed as pertaining to Judge Karohl himself.

2. Respondent further contends that no constitutional issue regarding the applicability of *New York Times* arises in this case because "the standard utilized was purely that of *New York Times*." Opp. 14. This argument is highly disingenuous. The Missouri Supreme Court began its analysis in the general direction of *New York Times*, stating that what Rule 8.2(a) proscribes are false statements impugning the qualifications or integrity of a judge "made with knowledge of the statements' falsity or in

reckless disregard of their truth or falsity." Pet. App. 13. From there, however, the court expressly departed from *New York Times*.

Focusing specifically on the reckless disregard component of the test, the court observed that in defamation cases directly covered by *New York Times* and its progeny, "the standard has consistently been a subjective one—the test not being whether a reasonably prudent person would have had serious doubts as to the truth of the publication, but whether the defendant in fact entertained such doubts." Pet. App. 13. The court then stated that it was not clear that the same test for reckless disregard should apply in disciplinary proceedings, while noting that *Garrison v. State of Louisiana*, 379 U.S. 64 (1964), indicates that it should, and further noting the substantial conflict among various state and federal courts on the issue. Pet. App. 13-14.

Ultimately, the court concluded that the proper test for reckless disregard in professional disciplinary proceedings is *not* the subjective *New York Times* test of whether the defendant in fact entertained serious doubts as to the truth of his statements, but "an objective one, dependent on what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances." Pet. App. 14. The court then proceeded to apply the objective standard to petitioner's conduct to determine whether he acted with reckless disregard, and concluded that he did because he "failed to investigate" before speaking out. Pet. App. 16. In so concluding, the majority left no doubt that it was applying an objective test for reckless disregard rather than the subjective *New York Times* standard.

3. Respondent strains to construct an argument that Westfall's remarks were made with actual knowledge that they were false, that the court below so found, and that the proper test for reckless disregard, therefore, is irrelevant to this case. The reasoning underlying respondent's argument goes as follows: Westfall's remarks connoted that Judge Karohl engaged in "deliberate dishonesty" and "professional misconduct." Yet, Westfall testified

that he respected Judge Karohl and did not question his personal integrity. Therefore, Westfall had actual knowledge that his remarks criticizing Judge Karohl were false. Opp. 10-11.

Among the fatal flaws in this argument is that the Missouri Supreme Court declined to embrace it, despite respondent's advancing it below. The court's opinion is totally devoid of any finding that Westfall knowingly made any false statements.[1] Indeed, the court went to great lengths to avoid basing its decision on any such factual finding. It was for this reason that the court reached the "reckless disregard" component of the *New York Times* standard and, in doing so, adopted the "objective" determination of "reckless disregard" that is the basis of Westfall's petition in this case. Respondent cannot now avoid that result by positing a nonexistent rationale for the state supreme court's ruling.[2]

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[1] While the special master below did subscribe to respondent's argument (Pet. App. 65-66), that is of no significance here since the Missouri Supreme Court heard this case *de novo* and failed to make or adopt any such finding. On review here is the decision of the Missouri Supreme Court, not findings of the master which the court declined to adopt.

[2] Nor, in any event, would the record in this case have supported any such factual finding. Westfall simply testified that he respected Judge Karohl and did not question his personal integrity in the least. Resp. App. 1a. Respondent, therefore, takes substantial license with the record in arguing: "Petitioner admittedly knew at the instant of his speech that the appellate judge he was about to vilify was, in truth and fact, a person of impeccable integrity who had engaged in no personal or professional misconduct with respect to the rendition of the *Bulloch* opinion." Opp. 9. Respondent's use of the record also is internally inconsistent and borders on the Kafkaesque. While accepting Westfall's testimony that he believed Judge Karohl to be an individual of integrity, respondent condemns as unworthy "retrostatements" Westfall's simultaneous assertion that he, accordingly, did not intend to impugn the judge's integrity. *Compare* Opp. 3 *with id.* at 5.

In addition, Respondent not only mischaracterizes what the Missouri Supreme Court found as a factual matter, but wrongly suggests that this Court is bound to accept the conclusions and characterizations of the court below concerning the nature and thrust of Westfall's comments. Opp. 7. In First Amendment cases, this Court must independently examine the whole record to make sure that the judgment below does not improperly impinge upon free expression, and that is particularly so where, as here, the critical issue is the presence or absence of actual malice. *See, e.g., Bose Corp. v. Consumers Union of United States*, 466 U.S. 485 (1984).

4. Respondent further argues, wrongly, that this case presents no conflict among state supreme courts. The Missouri Supreme Court below expressly acknowledged the existence of a substantial conflict among state supreme courts on whether a departure from the traditional *New York Times* standard is warranted in lawyer disciplinary proceedings (Pet. App. 13-15), and the conflict further is irrefutably demonstrated in our petition (pp. 11-16).

Respondent's argument to the contrary rests on the untenable proposition that any disagreement among the state courts simply reflects that *New York Times* sets a minimum standard, and that other states "are free to apply a more protective test." Opp. 17. What respondent conveniently ignores, of course, is that unless the state courts are exercising this 'freedom' through construction of state law, as opposed to federal constitutional interpretation—which a review of the conflicting state decisions discloses is not the case—the resulting difference in free speech protection is precisely the kind of conflict that warrants this Court's resolution.[3]

5. Finally, respondent's assertion that this case is wholly unrelated to *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720

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[3] Moreover, as discussed at pp. 14-15 of the petition, among the state court cases which give rise to the conflict are decisions which are *less* speech protective than the decision below or *New York Times*.

(1991) is misguided. Both *Gentile* and the present case involve different facets of the same overall question—the extent to which the First Amendment restricts states from imposing professional discipline against lawyers for exercising their rights to free speech.

*Gentile* suggests that lawyers' free speech rights may be restricted when, but only when, unfettered speech would impinge upon some other fundamental right, e.g., by prejudicing an adjudicative proceeding and thereby infringing the right to a fair trial. Respondent neither does nor could argue that Westfall's comments could have prejudiced any adjudicative proceeding. Opp. 13. The only conceivable legitimate state interest in curbing comments like Westfall's is the interest in protecting the good reputations of courts and judges; but this Court already has held that this interest, while genuine, is not of sufficient magnitude to warrant suppression of free speech. *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 841-42 (1978). Therefore, *Gentile*, in suggesting that lawyer speech may not be restricted absent a substantial countervailing state interest, is directly relevant to this case, and the Missouri Supreme Court's decision is inconsistent with it.

## CONCLUSION

This case squarely presents the constitutional issue of whether the *New York Times Co. v. Sullivan* test for actual malice—and particularly the subjective "reckless disregard" component of that test—applies in disciplinary proceedings brought against a lawyer for criticizing a judge. The facts of this case are undisputed, and the issue is sharply framed by lengthy majority and dissenting opinions. This case, therefore, provides an excellent vehicle for resolving the issue. We respectfully submit that the petition for certiorari should be granted for plenary review.[4]

Respectfully submitted,

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[4] Alternatively, we request that the Court grant the petition, vacate the judgment of the Missouri Supreme Court below, and remand for that court's reconsideration in light of *Gentile*.